IN THE ESTATE OF HEW WAI KWONG, DECEASED; SARAH ABDULLAH (PETITIONER)

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[PETITION NO: 32-70-1993]
27 JANUARY 1999

SUCCESSION: *Probate - Testamentary capacity - Testator's failing state of mental and physical health - Whether testator had testamentary capacity*

SUCCESSION: *Probate - Validity of will - Testator's failing state of mental and physical health - Change of testator's solicitor - Will prepared by solicitor upon instructions of petitioner - Thumbprint at attesting clause in will - Not proved to be that of testator's - Whether suspicious circumstances - Whether will valid - Wills Act 1959, s. 5*

The petitioner applied for a grant of probate in respect of a will ('the will') made by her late father. The petitioner submitted that the will was valid and that it had complied with all formal requirements. It was also submitted that the testamentary capacity of the testator was proven, as such, the court should give effect to the intention of the testator. The caveators herein objected to the petition, *inter alia*, that the testator lacked the testamentary capacity to make the will as he (the testator) was in failing state of mental and physical health when he affixed his thumbprint to the will. In his previous wills, the testator had manually affixed his signature thereto.

Held:

[1] For a testator to be capable of making a valid will, he must be able to understand the nature of the act and its effects and the extent of the property of which he is disposing. He must also be able to comprehend and appreciate the claims to which he ought to give effect and the manner in which his property is to be distributed between them.

[2] The burden of proving testamentary capacity rests on the person alleging the validity of the will. Thus, the petitioner had to prove that the testator was of sound mind, memory and understanding and that the testator approved of and had knowledge of the contents of the will when he executed it.

[3] All the steps taken in the making of the will were done and implemented by the petitioner. The petitioner was undoubtedly and

unambiguously the prime mover, while the testator was presented with a *fait accompli*. The acts and conduct of the petitioner were absolutely unilateral, constituting absolutely dubious, nebulous and suspicious circumstances.

[4] A testator of proper testamentary capacity will normally take precautions to alter his will or disinherit his near relations by referring to his usual solicitors who have acted for him in previous occasions. However, in this instance there was a change of the testator's usual solicitors to the new solicitor who had never spoken to the testator regarding the disposition of his assets in the will.

[5] As the will was prepared by the petitioner's own solicitor as the agent of the petitioner, the will could be construed as having been written or prepared by the petitioner who took a substantial benefit under the will. The petitioner who did an act through an agent indeed did it herself: *qui facit per alium facit per se*. This aroused the suspicion of the court.

[6] The petitioner failed to prove that the thumbprint at the attesting clause in the will was that of the testator. This was apparent from the evidence of the fingerprint expert who was unable to prove that the thumbprint at pp. 2 to 6 of the will was that of the testator. Thus, the petitioner failed to prove that the testator executed the will under s. 5 of the Wills Act 1959.

[7] Another factor of considerable importance was that the will was said to be executed by the testator who was an old and infirm person lying on a hospital bed with all the frailness, weakness and helplessness, without any record of medical examination and findings. That fact completely negatived the petitioner's effort or attempt to prove the testamentary capacity of the testator. It followed that the will was invalid.

[Petition dismissed.]

Cases referred to:
Banks v. Goodfellow [1870] LQ5 QB 549 ***(refd)***
Barry v. Butlin [1838] 2 MOO PCC 480 ***(refd)***
Battan Singh v. Amirchand [1948] 1 All ER 152 ***(refd)***
Lee Tjin Nam v. Lie Chin Man [1996] 1 CLJ 82 ***(refd)***
Tyrell v. Painton [1894] P 151 ***(refd)***
Udham Singh v. Inder Kaur [1971] 2 MLJ 263 ***(refd)***

Legislation referred to:
Wills Act 1959, s. 5(1), (2)

For the petitioner - Ganapathi Ramasamy (Saseedaran Achan with him); M/s Achan & Co
For the caveators - GT Vanan; M/s Zarina, GT Vanan & Assocs

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Petition For Probate

This is a petition by one Sarah bt Abdullah @ Hew Lee Ling ("the petitioner") for the grant of probate in respect of the will dated 29 January 1993 ("the will") made by her late father, Hew Wai Kwong ("the testator"), who died on 29 March 1993. It was submitted for the petitioner that the will is a valid will as it has complied with all formal requirements and that the testamentary capacity of the testator has been proved, in which event the court should give effect to the intention of the testator.

Objection

This petition was objected to by the caveators *viz* Madam Kwok Peck Wah and Hew Hon Choon, on his own behalf and also on behalf of the next of kin and friend for his siblings, Hew Hon Leong and Hew Hon Sam, on the following grounds:

1. The testator lacked testamentary capacity to make the will;
2. The petitioner had exercised undue influence over the testator; and
3. Fraud was perpetrated by the petitioner.

Specific Finding Of Facts And Decision Of The Court

In the light of the vehement objection by the caveators, the court proceeded with full hearing and numerous witnesses were called to adduce evidence for the petitioner and the caveators. After a careful analysis and evaluation of all the oral testimonies and documentary evidence, I have arrived at the specific finding of facts which may be narrated in the following manner.

The petitioner (PW1) is the testator's daughter and the sole executrix of the will. In early 1993, the testator was receiving medical and acupuncture

treatment at the Kuala Lumpur Tung Shin Hospital ("the Hospital") under the care of one Dr. Lau Chee Han. Subsequently, the testator had a mild stroke and was warded on 8 January 1993 until 18 January 1993 and the attending doctor was one Dr. Yap Boon Hung (PW4). The testator was readmitted to the hospital for urinary infection and he was inserted with a tube to drain urine from his system. The testator was indeed referred to him in January 1993 by one oncologist, Dr. Tan, who treated the testator for cancer of the nose. The testator was complaining of severe dizziness and was diagnosed to have suffered from a stroke from brain scan. He was warded for almost a week and was treated for his stroke, hypertension and diabetics. When the testator was treated by Dr. Yap Boon Hung, the testator developed an inability to pass urine and his bowel had to be washed. Dr. Yap Boon Hung prescribed Daonil for diabetics, Dixoxin and Adevat for high blood pressure and Persantin for blood circulation in the brain area, all given at 8.00 a.m. and 6.00 p.m. daily. The testator was given diabetic diet from 28 January 1993 to 30 January 1993 and was under saline drips *ie*, salt water running through a tube attached and inserted to one of the arms for 28 January 1993 and 29 January 1993. On 29 January 1993, the testator was inserted with suppository through the anus to liquefy the faeces.

When the testator was hospitalised on 28 January 1993, he was frail, bedridden, helpless and unable to feed himself, as a result of which the testator's daughter, Hew Lee Chin had to remain in the hospital to look after the testator. Hew Lee Jin, another daughter of the testator also took turn to assist the testator during the day while someone else attended to the testator at night. The testator was indeed unable to fend for himself, as during his stay in the hospital from 28 January 1993 to 30 January 1993, under the treatment of Dr. Yap Boon Hung, the testator was always sleeping and did not talk. The testator was then 76 years of age. Dr. Yap Boon Hung did not medically examine the testator prior to the testator's purported execution of the will on 29 January 1993. Dr. Yap Boon Hung testified that he saw the testator on 29 January 1993, at 5.00 – 6.00 p.m., when he merely did a superficial check on the testator. Dr. Yap Boon Hung admitted that no actual medical examination was carried out on the testator to confirm the state of the testator's mental health. However, at the request of the petitioner, Dr. Yap Boon Hung issued a verification letter (a memo) on the soundness of the testator's mind for "some banking matter". The doctor did not record the procedure or management in relation to the medical examination, if at all it was carried out, on the testator on 29 January 1993 when the will was purportedly executed by the testator. Dr. Yap Boon Hung was quite content to rely merely on memory and not

on any written record pertaining to the medical examination on the testator. Indeed, it was absolutely clear in the evidence of Dr. Yap Boon Hung that there was no such medical examination at all. In any event, when Dr. Yap Boon Hung went on his rounds between 5.00 p.m. and 6.00 p.m. on 29 January 1993, he had 15-40 patients, including the testator, to attend to. At the time of the purported execution of the will, the testator was suffering from constipation, diabetes, stroke, high blood pressure, under drips, and the insertion of suppository. The testator did not execute the will in his usual signature, which signature was indeed affixed in his two previous wills but merely affixed a thumb print in the will. The testator's inability to affix his signature on 29 January 1993 is not disputed at all. This inability was apparently related to the testator's obviously failing state of health, both physically and mentally. Indeed, the testator was unable to focus his state of mind in order to rationalise, which has resulted in the testator's inability to transmit the message from his mind to his hand for the purpose of signing his will. This is a strikingly sharp contrast to his previous wills which were indeed properly executed.

The memo which was given by Dr. Yap Boon Hung was dated 29 January 1993 and reads as follows:

> HEW WAI KWONG
> 128, JALAN RAYA, 5 SRI KEMBANGAN
> 43300 SELANGOR.
>
> The above patient is of sound mind at present at this date.

It is to be noted that Dr. Yap Boon Hung did not state in the memo whether at the material time he has ever examined the patient at all or the extent of the medical examination which, if any, was carried out by him. Indeed, Dr. Yap Boon Hung testified that he had not examined the patient before writing the memo. The petitioner has requested for this memo for the purposes of settling some financial matters in the bank and not for the purpose of enabling the testator to execute the will.

The petitioner in her evidence said that she brought the will to the bed-ridden testator, to whom the petitioner read the will in English, paragraph by paragraph and then translated the will in the Hakka dialect, as obviously the testator did not and could not understand English. The petitioner claimed that the testator had nodded his head in agreement.

PW2 and PW3 were invited by the petitioner to witness the will. These two attesting witnesses did not understand Hakka at all and they testified that they spoke to the testator in English, although Dr. Yap Boon Hung gave evidence that he spoke to the testator in Hakka, since the testator

could not speak English. The advocate and solicitor (PW5) one Tuan Syed Mohd Tahir bin Syed Azman who prepared the will did not act on the instruction of the testator. As a matter of fact, the testator had never met the advocate and solicitor at all. The will was prepared on the exclusive instructions of the petitioner. The petitioner had also asked the two attesting witnesses *viz* Puan Faridah bt Ahmad and Encik Md Yazid bin Sarman to swear two statutory declarations, to the effect that the testator had affixed his "thumbprint" to the will and that the attesting witnesses were present. As alluded to above, in all previous wills of the testator, the testator had manually affixed his signature thereto.

The report prepared by the fingerprint expert stated that the finger-print on p. 1 of the will has been compared with the testator's right thumb print in his National Registration Identity Card No. 0507603 and they were found to belong to one and the same person *ie*, the testator. However, in respect of the fingerprints at pp. 2, 3, 4, 5 and most importantly p. 6 of the will (which contains the execution clause), the fingerprint expert is unable to confirm that the fingerprints were those of the testator. This was due to the lack of the essential characteristics. The will purportedly made the petitioner the sole executrix and a major beneficiary to whom was bequeathed and devised:

(1) Lot No. 2986 with a double storey link house erected thereon;

(2) Half the proceeds from the sale of Lots 2931 and 2932, after paying the Testator's medical expenses;

(3) Half of all the testator's residuary estates;

(4) Half of all compensation if any, from the developer; and

(5) One-third of the land held under LM No. 586 P.T. No. 5054, Mukim Petaling, together with a house erected thereon.

The will had always been kept in the custody of the petitioner.

The aforesaid two statutory declarations were backdated, at the request of the testator in order to coincide with the date of the purported execution of the will. The petitioner was racing through the purported execution of the will in the face of absolutely dubious, devious, nebulous and suspicious circumstances.

Although the cavetors have raised three grounds, *viz* the lack of testator's testamentary capacity, the presence of undue influence and fraud, as the grounds in their objection to the grant of probate for the will, I am of the view that the first ground *ie*, the lack of testator's testamentary capacity

is the most crucial and pivotal issue, the determination of which would finally dispose of the matter in the proceedings before me.

For a testator to be capable of making a valid will, he must be able to understand the nature of the act and its effects and the extent of the property of which he is disposing, and he must be able to comprehend and appreciate the claims to which he ought to give effect and the manner in which his property is to be distributed between them: *Banks v. Goodfellow* [1870] LQ5 QB 549. This principle was followed by our Federal Court in *Udham Singh v. Inder Kaur* [1971] 2 MLJ 263, 264 I rt. where Ismail Khah, CJ (Borneo), delivering the judgment of the Federal Court, held that it is clear law that the burden of proving testamentary capacity rests on the person alleging the validity of the will *ie*, the petitioner who is the propounder of the will. The petitioner has to prove that the testator was of sound mind, memory and understanding and that the testator approved of and had knowledge of the contents of the will when the testator executed it: *Lee Tjin Nam @ George Lee Chin Nam v. Lie Chin Man* [1996] 1 CLJ 82.

The facts and circumstances preceding and leading to the purported execution of the will by the testator had been alluded to above in my specific finding of facts. The facts which are most pertinent to the issue of the testator's testamentary capacity are that the will was executed on the hospital bed on which the testator was lying on 29 January 1993, when the testator developed an inability to pass urine. Various medicines were prescribed for diabetes, high blood pressure and blood circulation in the brain of the testator. At all material times *ie*, from two days *viz* on 28 Janaury 1993 to 30 January 1993, the testator was given diabetic diet. Meanwhile, the testator was under saline drips *ie*, salt running through a tube attached and inserted to one of the arms for 28 January 1993 and 29 January 1993. On 29 January 1993, the testator was inserted with suppository through the anus to liquefy the faeces. These facts and circumstances lead me to the irresistible conclusion that the testator did not have the necessary testamentary capacity to make the will on 29 January 1993.

The testator had on two previous occasions made two wills, dated 22 March 1988 and 2 September 1988 respectively. Both these previous wills were prepared by the firm of solicitors Baharuddin, Bernatt, Tan, Ker, Kuala Lumpur and the attesting witnesses were one Mr. Tan Chek Yoke (advocate and solicitor) and one Chong Wah Mei, for the will dated 22 March 1988, and Tan Chek Yoke (advocate and solicitor) and one Choong Lee Min for the will dated 2 September 1988. It seems clear to me that the testator's

usual solicitors had consistently been Messrs Baharuddin, Bernatt, Tan, Ker and one Mr. Tan Chek Yoke was consistently the attesting solicitor. The impugned will in question was prepared by one Tuan Syed Mohd Tahir bin Syed Azman, an advocate and solicitor who was not one of the two attesting witnesses, unlike the two previous wills made by the testator. The will in question was prepared by an advocate and solicitor who is the personal friend of the petitioner, but there is no evidence to the effect that the advocate and solicitor was ever known to the testator. The two attesting witnesses were also the petitioner's personal friends but otherwise also apparently unknown and are indeed strangers to the testator. Further, it was the petitioner who instructed the said Tuan Syed Mohd Tahir to prepare the will. It was also the petitioner who took the initiative and requested the two attesting witnesses to witness the will. It was again the petitioner who caused the two statutory declarations to be signed by the two attesting witnesses and on the petitioner's instructions, the two statutory declarations were backdated. It seems crystal clear to me that all steps taken by the petitioner as established in the entire evidence for the purposes of making the will, were indeed taken and implemented by the petitioner. The petitioner was undoubtedly and unambiguously the prime mover, while the testator was presented with a **fait accompli**. The acts and conduct of the petitioner are absolutely unilateral constituting, at the risk of repetition, absolutely dubious, devious, nebulous and suspicious circumstances. The change of the testator's usual solicitors to the new solicitor who has never spoken to the testator regarding the disposition of his assets in the will is a bizarre situation. A testator of proper testamentary capacity would normally take precautions to alter his will or disinherit his near relations, by referring to his usual solicitors who have acted for him on previous occasions. A similar situation prevailed in *Battan Singh v. Amirchand* [1948] 1 All ER 152 where Lord Normand held the will there to be invalid. At p. 156, his Lordship said:

> It is relevant to note that he failed to employ the solicitor who had acted for him on previous occasions or even to ask him to send the previous wills or copies of them, for these are precautions which a testator of sound mind who deliberately intended to alter his will and to disinherit his near relations would naturally take. The result was that he obtained the services of a solicitor unacquainted with his family affairs and unable to judge whether he had the capacity to make a will with due regard for the claims of his nephews for whom he had till the closing days of his life always felt a warm affection.
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> (See also *Lee Tjin Nam*, *supra*).

The impugned will in question was prepared by the petitioner's own solicitor as the agent of the petitioner. Hence the will may be construed as having been written or prepared by the petitioner who takes a substantial benefit under the will. The petitioner who did an act through an agent indeed did it herself: *Qui facit per alium facit per se*. In this connection, it is pertinent to refer the observation of Parke, B in *Barry v. Butlin* [1838] 2 MOO PCC 480, at pp. 482 and 483 as follows:

> ... if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicions of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. (See also *Lee Tjin Nam, supra*).

As stated above, the instructions to prepare the will emanated from the petitioner and not from the testator. Such a circumstance, to say the least, would excite the suspicion of the court and could lead to the invalidity of the will.

In *Tyrell v. Painton* [1894] P 151 Lindley LJ says (p. 157):

> The rule in *Barry v. Butlin* 2 Moo PC 480, *Fulton v. Andrew* LR 7 HL 448 and *Brown v. Fisher* 63 LT 465, is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicions, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on these who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will. (See also *Lee Tjin Nam, supra*).

Further, the petitioner before me has failed to prove that the thumbprint at the attesting clause was that of the testator. This was apparent from the evidence of the fingerprint expert who was unable to prove that the thumbprint at pp. 2 to 6 of the will was that of the testator. That being the case, the petitioner has failed to prove that the testator has executed the will. Section 5(1) of the Wills Act 1959 sets out the essential requirement of execution in order to bring about a valid will in that no

will shall be valid unless it is in writing and **executed** in the manner provided in s. 5(2) of the same Act *ie*, every will **shall be signed** by the testator and such signature shall be made by **the testator** as the signature to his will.

Another factor of considerable importance is that the will was said to be executed by the testator who was an old and infirm person lying on a hospital bed with all the frailness, weakness and helplessness, without any record of the medical examination and findings in relation to the testator. This fact has completely negatived the petitioner's effort or attempt to prove the testamentary capacity of the testator.

On the foregoing grounds, I am of the view that the testator did not have the testamentary capacity to make the will which I hereby declare invalid. I therefore dismiss this petition with costs. In the circumstances, I do not find it necessary to consider the issues relating to undue influence or fraud.